SUPREME COURT OF QUEENSLAND

CITATION:	*Australasian Medical Insurance Limited & Anor v CGU Insurance Limited* [2009] QSC 235
PARTIES:	**AUSTRALASIAN MEDICAL INSURANCE LIMITED** **ACN: 003 707 471** (first plaintiff) **QUEENSLAND MEDICAL LABORATORY** **(A PARTNERSHIP)** (second plaintiff) **v** **CGU INSURANCE LIMITED** **ACN: 004 478 371** (defendant)
FILE NO/S:	BS No 1426 of 2000
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 August 2009
DELIVERED AT:	Brisbane
HEARING DATES:	25, 26 August 2008 and 3 August 2009 (submissions in last/reply delivered 19 August 2009).
JUDGE:	Chief Justice
ORDER:	**1. That the proceeding be dismissed;** **2. That the plaintiffs pay the defendant's costs of and incidental to the proceeding, including any reserved costs, to be assessed on the standard basis; and** **3. That there be liberty to apply in relation to the question of costs, should it be submitted some alternative order is appropriate.**
CATCHWORDS:	INSURANCE – DOUBLE INSURANCE – INSURANCE IN GENERAL – alleged double insurance – whether policies cover same risk – identity of parties to defendant's policy – whether exclusion of cover avoided by s 45 of *Insurance Contract Act* 1984 (Cth) – estoppel by convention *Insurance Contracts Act* 1984 (Cth), s 45 *Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342, considered *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, distinguished

Campbell v Turner [2008] QCA 126, cited
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471, cited
Legione v Hateley (1982) 152 CLR 406, applied
Maye v Colonial Mutual Life Assurance Society Ltd (1924) 35 CLR 14, applied
Moratic Pty Ltd v Gordon [2007] NSWSC 5, considered
Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603, considered
Speno Rail Maintenance Australia Pty Ltd v Metals and Minerals Insurance Pte Ltd (2009) 253 ALR 364, considered
Thompson v Palmer (1933) 49 CLR 507, applied
WorkCover Queensland v Suncorp Metway Insurance Ltd (2005) 2 Qd R 210, cited

COUNSEL: G W Diehm SC with A Luchich for the plaintiffs
L F Kelly SC with D J Pyle for the defendant

SOLICITORS: Flower & Hart for the plaintiffs
Thynne & Macartney for the defendant

[1] **CHIEF JUSTICE:**

Introduction

The second plaintiff (QML) is a partnership of pathologists. They are listed in para 1(c) of the applicable amended statement of claim. The first plaintiff (AMIL) was the professional indemnity insurer of each of the partners. The defendant (CGU), sometimes called "Pacific Indemnity", was an underwriter from which the plaintiffs seek contribution on the basis of an alleged double insurance.

[2] The claim for contribution relates to a claim pursued in court proceedings brought by Tracey Leigh D'Arcy and Scott John Vinnicombe against QML, for damages for QML's negligence, on the basis that QML failed properly to interpret the results of a pap smear on 18 February 1993, a failure which resulted in a lost opportunity to

prevent the development of the cervical cancer which subsequently afflicted her. AMIL was obliged to indemnify QML in respect of QML's liability under that claim, and AMIL did so. AMIL accordingly paid the claimants $435,000 for damages and $33,000 for costs, and itself incurred costs amounting to $18,517.95. It was common ground that QML was liable to those claimants, and that QML's settlement with them was reasonable.

[3] The insurance policy issued by CGU for the relevant year, which was 1997-8, is Ex 3. QML claimed an indemnity from CGU under that policy, and CGU refused it.

[4] QML operated in tandem with three companies, Queensland Medical Services Pty Ltd which, as is apparent from its name, was a service company for the QML partnership, and Renbond Pty Ltd and Samboor Pty Ltd. Dr David Russell was the general manager of the broad trading group, which included the partnership. Dr Russell's evidence (day 1, p 79, ll 10-60) was that the trading name "QML" was used for the group, including the companies and the partnership, although it could be used to refer to the partnership alone. Queensland Medical Services Pty Ltd employed about 1,500 staff. Those staff members included cytologists, who were employed by that company (Dr Russell day 1, p 22, ll 9-32). The cytologists were scientists, not medical practitioners or pathologists, and they were the persons who screened the samples.

[5] Dr Russell was responsible for managing the insurance risks of the trading group. He made sure the individual pathologist partners kept up their professional indemnity cover with AMIL. It was he who arranged, in addition, for the involvement of a broker to look after QML's cover. In about 1991, that broker

became Marsh and McLennan. The CGU policies were issued by CGU through QML's agent, the broker Marsh and McLennan. At material times, Ms Nicolson (formerly Ms Karen Lacheca, prior to marriage) was the relevant officer of Marsh and McLennan, and she dealt with Mr Hansen of CGU. Ms Nicolson was a witness, not called by the plaintiffs AMIL and QML, but called under subpoena by the defendant CGU.

[6] With some comparatively slight reservation, there was no substantial challenge to the accuracy of the evidence of those witnesses. The more relevant question was the significance of their evidence in establishing a matrix against which the CGU policy might be construed, and from which any estoppel by convention may have arisen.

[7] AMIL and QML claim a declaration that QML is entitled to indemnity under the 1997/8 policy Ex 3 in respect of the D'Arcy/Vinnicombe claim, and AMIL claims contribution from CGU towards the amounts it paid in settling those claims. CGU denies those claims for relief.

[8] The first issue is whether, in the year 1997/8, a situation of double insurance arose, in relation to the D'Arcy/Vinnicombe claim, in respect of each of QML's pathology partners' policies of insurance with AMIL, and QML's policy with CGU. That involves examination of the respective policies, determining the parties to them, and analysing the risks they embraced.

[9] A second issue is whether, assuming a situation of double insurance would otherwise arise, QML and CGU were, by convention, estopped from adopting the construction of the CGU policy which would give rise to that situation.

[10] A third possible issue concerns the extent of any consequent contribution: would it be on a 50%/50% basis, as contended for by the plaintiffs; or, as against CGU, limited to one-seventeenth, allowing for there being 16 separate policies between the respective partner pathologists and AMIL, along with the single CGU policy?

The policies

The CGU policy

[11] The 1997/8 policy defined "insured" as meaning the persons named in the Schedule to the policy, the members of a partnership named in the Schedule and the corporations named in the Schedule, and any director of any entity named in the Schedule.

[12] The Schedule identified the insured in this way:

> "QUEENSLAND MEDICAL SERVICES PTY LTD
> SAMDOOR PTY LTD
> RENBOND PTY LTD
> T/AS QUEENSLAND MEDICAL LABORATORY
> PARTNERSHIIP"

[13] The policy expressed the following cover:

> "Indemnify the Insured against any Claim including all legal costs and expenses for which the Insured shall become legally liable to the Claimant up to but not exceeding in the aggregate for all Claims under this Policy, the Total Sum Insured being a Claim:-
>
> (1) made against the Insured during the Period of Insurance; and
>
> (2) as soon as reasonably practicable, notified in writing to Pacific Indemnity by the Insured during the Period of Insurance; and
>
> (3) arising from any actual or alleged act, error, omission or conduct wherever the same occurred subsequent to the Retroactive Date specified in Item 6.4 of the Schedule."

[14] It is pertinent to mention now item 11 of the Schedule, which provides:

> "Notwithstanding anything contained herein to the contrary, this policy does NOT indemnify the Insured in respect of a claim or claims made arising from the activities of Pathologists and/or Medical Practitioners providing services for or on behalf of the Insured, where such Pathologist or Practitioner is entitled to indemnity under a Medical Defence Union or Protection Society or other Professional Indemnity Insurance. This exclusion shall apply whether or not indemnity has been granted by the Defence Society, Association or relevant Insurer."

[15] The level of cover under the policy was $2,000,000 for the 1997/8 year, and the premium was $29,000 plus stamp duty. I will shortly mention the much larger liability covered under the AMIL policies with the individual pathologists, aggregating $71,000,000. The $29,000 premium paid for the CGU policy was payable in a context where the prospective liability of some 1,500 non-medical staff fell to be covered (but largely not, CGU contends, the partner pathologists).

The AMIL policies

[16] These policies insured against the negligence risks incurred by the respective pathologists engaging in their professional practices. Each policy was separate and distinct. They covered the partners for different amounts. For example, in 1997/8, Dr Appleton's cover was for a liability of $1,000,000, whereas Dr Smith's was for $5,000,000.

[17] Exhibit 6 comprises the schedules for all 16 policies. In the aggregate, they provided cover for a liability of $71,000,000, as I have said, with "discreet assistance" available beyond that limitation. There was no evidence of the amounts of the premiums paid under those policies.

[18] The primary terms of the policies were alleged in para 11 of the statement of claim, and admitted:

> "It was a term of each First Policy [AMIL policy] between the First Plaintiff [AMIL] and the relevant partner of the Second Plaintiff (QML) that the First Plaintiff would pay the relevant partner of the Second Plaintiff or on the relevant partner of the Second Plaintiff's behalf, up to the amount stated in the Schedule for the following:
>
> (a) All Sums which You have become legally liable to pay as compensation for any civil liability in respect of claim(s) against You which:
>
> (i) arise directly in connection with your Profession …
>
> (b) for the purposes of the First Policy:
>
> …
>
> (ii) 'You/Your' means the person named in the Schedule
> …
>
> (iv) 'Profession' means the provision by You of medical treatment, advice and services to patients in the course of your medical practice."

The D'Arcy claim

[19] I turn now to the claim in issue.

[20] Ms D'Arcy alleged that on 18 February 1993, she provided QML with a pap smear. The QML report on that incorrectly said that the sample was free of any cancerous cell (Ex 20, p 1). That report, prepared by a cytologist (unidentified), was not signed by a pathologist. There was no evidence a pathologist checked it.

[21] The QML report on a second pap smear provided by Ms D'Arcy on 2 March 1995 noted the presence of abnormal cells, leading to the diagnosis of cervical cancer.

[22] Ms D'Arcy and Mr Vinnicombe (claiming for loss of consortium etc) brought their proceeding against the QML partnership. They did not join any non-medical employee, such as a cytologist. The pleadings are Ex 21. They did not contain any

allegation of negligence on the part of any cytologist. The allegations were of breach by the partners. Hence the particulars in para 9:

> "● particular (a) of the negligence was:
>
> 'The Defendant failed to ensure that due care and skill was exercised in the performance of examinations on the 1993 pap smear';
>
> ● particular (b) of the negligence was:
>
> 'The Defendant failed to ensure that examinations on the 1993 pap smear were performed with such professional care and skill as could reasonably be expected of a pathology specialist'."

[23] The statement of agreed facts in this instant proceeding (Ex 1) summarizes the D'Arcy proceeding in this way:

> "3. That Tracey Leigh D'Arcy and Scott John Vinnicombe instituted proceedings against the Second Plaintiff [QML, a partnership] claiming damages for personal injuries caused by the Second Plaintiff's negligence regarding a failure to properly interpret the results of a pap smear performed on 18 February 1993, resulting in a lost opportunity to prevent the development of a cervical cancer which subsequently emerged.
>
> …
>
> 5. The First Plaintiff [AMIL] was obliged to indemnify the Second Plaintiff [QML, a partnership] with respect to the said claims.
>
> …
>
> 8. The Second Plaintiff was liable for negligence to the Claimants."

[24] Counsel for the defendant made the following points:

> "It is possible that the cytologist acted reasonably and within the level of her competence in examining the first slide of 1993. The failure to supervise her work by the partners of QML was negligence by the partners of QML. That failure in the system was not negligence by the cytologist and it is not vicarious liability by QML. It was a failure to have a system where the slide was read and checked so that an erroneous report was not made."

[25] That assumes significance because of the basis on which AMIL contends CGU's liability arose. In paras 18-19 of the statement of claim, AMIL alleges that each of the pathologist partners fell within the definition of "insured" under the CGU policy, and that Ms D'Arcy's claim arose from the act or omission of a cytologist who was not a pathologist or medical practitioner and not entitled to indemnity under a medical defence union policy etc. The last reservation refers to item 11 in the schedule to the policy. The claim was presented in that way to distinguish it from the sort of claim for which a pathologist partner would be primarily liable, such a claim as would activate the AMIL coverage.

[26] In this context the following circumstances are significant: that Ms D'Arcy alleged a breach by the partners of their primary duty to exercise care and skill as pathologists; that the "agreed facts" include the statement that Ms D'Arcy's proceeding alleged negligence on the part of the partnership as the cause of her loss; that there was no proof in this instant proceeding that a cytologist was negligent, notwithstanding QML's capacity to establish that if it was indeed the case. Dr Russell, QML's general manager, gave evidence, and he said that he would be surprised if any QML doctor had supervised the interpretation of the screening (day 1, p 77, ll 1-5), but Dr Russell was unaware of the circumstances and could do no more than speculate as to what occurred (day 1, pp 27-28). I regard that assessment from Dr Russell as no more than speculative, and therefore unhelpful.

[27] I infer that the claim was accepted and processed on the basis on which it was advanced, that is, as alleging negligence on the part of the QML partners for their failure properly to check the analysis of the pap smear. Consistently with that, after the incorrect reading in 1993, and at the time of other proceedings instituted against

the QML partners in New South Wales in 1995 by Ms Fraser (to which I will come), QML put into place more rigorous systems to improve the screening process (day 2, pp 22-24; day 1, p 78, ll 40-55).

[28] The AMIL policy plainly responded to the D'Arcy claim. The issue is whether the CGU policy did, assuming it extended coverage to pathology partners. I first address the validity of that assumption.

Whether the pathology partners were "insured" parties under the CGU policy

[29] The Schedule to the policy names, as the "insured", the three companies "t/as Queensland Medical Laboratory Partnership". The term "insured" is defined to include the members of a partnership named in the Schedule.

[30] Counsel for the defendant submitted that "a partnership was not named in the Schedule. The words 't/as Queensland Medical Laboratory Partnership' were adjectival and were referring to the three corporate entities named in the Schedule … there is a difference between the adjectival use of a trading name and a partnership as a firm."

[31] Counsel for the plaintiffs submitted that "quite clearly (the QML partnership) is named as an insured in the Schedule and … the reference to 'T/AS' should be ignored." In the event of any ambiguity, the plaintiffs invite recourse to these following circumstances.

[32] The CGU policy defines "proposal" as the written proposal dated 6 May 1997 (see also cl 6.6 schedule). Question one in the proposal asks the names of all natural persons comprising the proponent. The answer was "Queensland Medical

Laboratory Partnership – list of names attached". Those were the names of the partners of QML.

[33] Ms Nicolson explained how the problem arose. The 1997/8 policy was the successor to the previous year's policy, which had named the partners in the Schedule (Ex 2). In the instant policy, the wording changed, so that the term "insured" extended to the members of a named partnership, with the consequence that there was no need to list the names of the partners in the Schedule (Ex 30, paras 42-47). On that basis, one may infer that the retention of the letters "T/AS" may have been a mistake. Ms Nicolson and Mr Hansen gave their evidence on the assumption that the partners were included as "insured parties" (Ex 30 paras 42-47, day 3 p 64 ll 45-60, p 65, ll 1-20).

[34] Counsel for the defendant submitted that the plaintiffs cannot have the pathologist partners brought within the CGU policy as "insured" persons without having the policy rectified. The plaintiffs abandoned a claim for rectification shortly before the commencement of the trial last year. Counsel for the defendant relied on *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, 482-3. On the other hand, the plaintiffs contend that the partners are brought in as "insured" persons by a proper process of construction of the policy.

[35] A possible explanation for the exclusion of the partners from the scope of the "insured" under the CGU policy may have rested in the view that because their insurance was provided by the AMIL policies, there was no need for them to be covered by the CGU policy as well; the CGU policy was intended to provide cover

for employees, and they were employed by Queensland Medical Services Pty Ltd, which was named as an insured party.

[36] Notwithstanding that consideration, the conjunction of the incorporated "proposal", naming the partners of "Queensland Medical Laboratory Partnership" as proponents of the policy on the one hand, and on the other hand, the inclusion of the descriptor "T/AS" before the reference in the Schedule to that partnership, does to my mind raise an ambiguity. On the one hand, the partners were seeking their inclusion, as proponents, and the policy acknowledged that. Yet when we come to the Schedule, the reference to the partnership is preceded by "T/AS" (which we know was a remnant of the predecessor policy and should have been deleted). Dr Russell's evidence was that "QML" was the trading name used by the companies and the partnership as a group (day 1, p 79, ll 10-60). But the reference in the Schedule is not to that trading name (QML), but to "T/AS Queensland Medical Laboratory Partnership", that is, with the word "partnership" included. The ambiguity is simply resolved, by ignoring the letters "T/AS".

[37] In *Maye v Colonial Mutual Life Assurance Society Ltd* (1924) 35 CLR 14, 22-3, Issacs J refers to the desirability of a composite reading in cases of ambiguity. In this case, that warrants the approach I have adopted, with the conclusion that the partners named in the proposal are to be regarded as falling within the scope of the "insured" under the policy.

Construction of CGU policy

[38] The next issue logically falling for determination is whether, the question of estoppel by convention aside, cover under the CGU policy, as that policy is

naturally construed, extended to the D'Arcy claim. It is necessary to address, first, item 11 of the Schedule to the policy.

Item 11: s 45 *Insurance Contracts Act* 1984 (Cth)

[39] Prima facie, CGU would have been obliged to indemnify the partners in relation to the D'Arcy claim, item 11 aside. That emerges from the natural application of the terms in which the right to indemnity is expressed. But item 11 would exclude that cover, because the claim arose from the partners' activities as pathologists providing services on behalf of the insured, attracting cover under the AMIL policy.

[40] The plaintiffs submitted, however, that s 45(1) of the *Insurance Contracts Act* 1984 (Cth) avoided item 11. Section 45(1) of the Act provides:

> "Where a provision included in the contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, including a law of a state or territory, the provision is void."

[41] Counsel for the defendant submitted that s 45 does not apply "because the insured is different and the risk covered is different in the case of the AMIL policy and the CGU policy". There is some difference in the "insured": under the AMIL policies, the insured parties are the respective partners; under the CGU policy, they are the aggregation of the partners and the service companies. I consider, however, that applying s 45, one looks at the insured under the CGU contract in a distributive way: have the pathologist partners (being the objects of the claim) entered into another applicable indemnity policy? They have. The other question is whether the respective policies cover the same risk. Subject to another question to which I will come shortly, in my view they do.

[42] Counsel then submitted that item 11 is not a provision "limiting or excluding" liability, but "merely assists in defining" the risk covered by the CGU policy: "special condition 11 must be read with the remainder of the policy as defining the nature of the risk covered and not as an isolated exclusion clause of the type which section 45 is aimed at".

[43] I do not accept that submission. Because a right to indemnity in respect of the D'Arcy claim would arise under the provision in the policy according the indemnity, Item 11 must be read as "limiting or excluding" that right to indemnity in the specified circumstances. That would mean that item 11 is void.

[44] Counsel for the defendant then submitted that the following words should be severed from the clause, which may then lawfully operate: "… where such Pathologist or Practitioner is entitled to indemnity under a Medical Defence Union or Protection Society or other Professional Indemnity Insurance". Severance is plainly available in an appropriate case. See *Speno Rail Maintenance Australia Pty Ltd v Metals and Minerals Insurance Pte Ltd* (2009) 253 ALR 364 paras 8-11, 104-109. In that case, Beech AJA said (para 109):

> "The test for severability is that severance of a contractual term that is void by reason of public policy or statute is permissible if the elimination of the invalid promises changes the extent only but not the kind of the contract: *McFarlane v Daniell* (345); *Thomas Brown & Sons Ltd v Fazal Deen* [1962] HCA 59; (1962) 108 CLR 391, 410-411; *SST Consulting Services Pty Ltd v Rieson* [2006] HCA 31; (2006) 225 CLR 516, [41] – [48]."

[45] Counsel submitted as follows:

> "In this present case there is no logical reason or reason of fairness why the potentially offending words cannot be severed so that the exclusion in respect of claims made arising from the activities of pathologists or medical practitioners continues to form part of the

> Policy. This severance does not undermine the effect of s 45 of the Act."

[46] In my view, allowing for the pathologist partners being "insured" parties to this CGU policy, the parties intended to exclude coverage in circumstances where claims arose for their pathology work, but only provided they would not be left high and dry without cover, that is, provided it was clear they would be covered under another policy such as the AMIL policies. In other words, it was a composite exclusion, not susceptible of being broken down into one part which might be excluded and one part which might be retained. Otherwise, the exclusion would be broadened contrary to the parties' intention, and in a sense, CGU would "benefit from its own breach (as the party which drafted the clause)" (plaintiffs' submissions in reply).

[47] I earlier said I was reserving one point to which this conclusion of voidness must yield, if it be a good point. That is CGU's contention that properly construed, and even before one gets to item 11, the CGU policy did not cover this sort of situation.

The Codelfa point

[48] This point is developed from a number of factual considerations – to which I will come in more detail in dealing with the estoppel by convention argument – justifying the following conclusion, which I adopt from the defendant's Counsel's submission:

> "QML (by its general manager Dr Russell), QML's agent (Ms Nicolson) and CGU (by its underwriter Mr Hansen) all intended, in an objective sense, and actually in fact, that the CGU policy would cover QML for a risk not covered by the AMIL policy. None of them intended that it should cover a risk already covered by the medical defence insurance which the partners of QML had."

[49] Counsel made substantial reference to the case law on the construction of insurance contracts. But it seemed to me that this submission depended principally at least on the exception expressed by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 347-353:

> "There may perhaps be one situation in which evidence of the actual intention of the parties should be allowed to prevail over their presumed intention. If it transpires that the parties have refused to include in the contract a provision which would give effect to the presumed intention of persons in their position it may be proper to receive evidence of that refusal. After all, the court is interpreting the contract which the parties have made and in that exercise the court takes into account what reasonable men in that situation would have intended to convey by the words chosen. But is it right to carry that exercise to the point of placing on the words of the contract a meaning which the parties have united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances: see *Heimann*, (38 SR (NSW) at 695)."

[50] There is however no suggestion in this case that the parties refused to include in the policy a provision excluding cover in the D'Arcy situation, or united in rejecting such a provision. On the contrary, they included item 11. The problem is that it was not lawful for them to do that. They chose a mechanism which failed as a matter of law. That they chose positively to proceed that way leaves no scope for even an inference that they contemplated an express exclusion, in the emasculated form raised above in relation to the severance, but directly declined to include it, believing, say, that it was unnecessary because that was what the contract meant anyway.

[51] Hence my conclusion that, subject to the issue of estoppel by convention, the CGU policy covered the same risk as the AMIL policy, raising a situation of double insurance (cf. *Albion Insurance Co Ltd v Government Insurance Office of New South Wales* (1969) 121 CLR 342, 345, 352; *Burke v LFOT Pty Ltd* (2002) 209

CLR 282; *WorkCover Queensland v Suncorp Metway Insurance Ltd* (2005) 2 Qd R 210).

[52] The relevant principles of double insurance may be taken from this analysis in *Albion Insurance Co* (supra):

> "There is double insurance when an assured is insured against the same risk with two independent insurers. To insure doubly is lawful but the assured cannot recover more than the loss suffered and for which there is indemnity under each of the policies. The insured may claim indemnity from either insurer. However, as both insurers are liable, the doctrine of contribution between insurers has been evolved …
>
> … The doctrine, however, only applies when each insurer insures against the same risk, although it is not necessary that the insurances should be identical. Thus one insurer may insure properties A and B against fire and the other insurer may only insure property A against fire. Again, one policy may be for a limited amount and the other may be for an unlimited amount. One policy may cover the risk of a whole voyage and the other may cover only part of the voyage. Differences of this sort may affect the amount of contribution recoverable but they do not bear upon the question whether or not each insurer has insured against the same risk so as to give rise to some contribution. …
>
> What attracts the right of contribution between insurers, then, is not any similarity between the relevant insurance contracts as regards their general nature or purpose or the extent of the rights and obligations they create, but is simply the fact that each contract is a contract of indemnity and covers the identical loss that the identical insured has sustained; for that is the situation in which 'the insured is to receive but one satisfaction' (to use Lord Mansfield's expression) and accordingly all the insurances are 'regarded as truly one insurance': *Sickness and Accident Assurance Association Ltd v General Accident Assurance Corporation Ltd*."

Estoppel by convention

[53] CGU ultimately submitted, notwithstanding a conclusion that a situation of double insurance otherwise arose, that an estoppel by convention existed between QML and CGU making it unjust that QML and AMIL now be permitted to resile from that convention by the present claim.

Legal principle

[54] The classical exposition of the relevant law may be gathered from *Legione v Hateley* (1982) 152 CLR 406, 430-1 and *Thompson v Palmer* (1933) 49 CLR 507, 547.

[55] In the former, Mason and Deane JJ said:

> "It is customary to recognize three general classes of estoppel, namely, of record, of writing and in pais … Estoppel in pais includes both the common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement."

[56] In *Thompson v Palmer*, Dixon J said:

> "The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct …; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted."

[57] Referring to *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at para 199 and *Moratic Pty Ltd v Gordon* [2007] NSWSC 5 para 32, Counsel for the defendant

offered the following convenient summary of what must be established for this estoppel to apply:

1. QML has adopted an assumption as to the terms of its policy with CGU.
2. CGU has adopted the same assumption.
3. Both QML and CGU have conducted their business relationship on the basis of that mutually held assumption.
4. Each knew the other was proceeding on that basis, or intended that it do so.
5. Were QML to depart from that assumption, detriment or injustice would result to CGU.

[58] I now deal with three matters, before passing to the circumstances giving rise to the estoppel: they are first, the effect of any estoppel on AMIL; second, whether CGU would suffer relevant detriment or injustice were the convention to be ignored; and third, the significance to any estoppel of s 45 of the *Insurance Contracts Act* 1984 (Cth).

Whether any estoppel affects AMIL

[59] It might be asked why AMIL, in addition to QML, would be affected by any such estoppel. Where double insurance applies, "each insurer insures against the same risk". One must therefore look at the risk covered by the respective indemnities. What risk is covered by the CGU policy? It is the cover which the insured under that policy may enforce. If the partners of QML would be estopped from recovering under the CGU policy for this liability, whereas recovery under the AMIL policy is open, then the policies do not in truth extend the same cover, because under the CGU policy, the insured is precluded from recovering for this relevant liability which is however provided for by the AMIL policies.

Whether departure from the assumption would be unjust

[60] Counsel for the plaintiffs submitted that, accepting for argument that the relevant assumption is established, "it is difficult to see how [CGU] has demonstrated that any so-called departure by [QML] from the alleged assumption … would in fact operate to [CGU's] detriment". The short answer to that contention is that it would expose CGU to a financial liability which the parties intended not apply; or as put for CGU in the submissions in reply, "CGU would be liable to contribute in circumstances where it otherwise would not have had to do so".

Whether the estoppel would run against the statute

[61] Counsel for the plaintiffs submitted that upholding an estoppel by convention would subvert the operation of s 45 of the *Insurance Contracts Act* 1984 (Cth), invoking the principle that an estoppel cannot run against a statute.

[62] That statutory provision operates to avoid item 11. As submitted for the plaintiffs, the heart of the defendant's estoppel argument emerges from para 2A(e) of the defence, which alleges a representation by QML to CGU that the CGU policy "would not cover the risk of negligence by non-employee medical practitioners of (QML) namely the principals of the QML partnership". I consider that representation to have been established. It focused not on the availability of insurance elsewhere for the principals, but on the scope of this particular CGU policy. It is not concerned with excluding from CGU a cover which would otherwise apply, but defining, primarily, the scope of the CGU policy, so that it might supplement, but not duplicate, other existing insurance. As put for CGU in the submissions in reply, "the assumption and understanding was about the nature of the risk being covered. This has nothing to do with any exclusion of liability by

CGU on the basis of the AMIL policy which is the mischief to which s 45 of the Act is directed." Giving operation to the estoppel does not therefore subvert the statutory provision, which has done its work by excluding item 11. The estoppel arose independently of item 11.

[63] See, in any case, *Campbell v Turner* [2008] QCA 126, paras 32, 39 and 46.

The circumstances giving rise to the estoppel

[64] In the interests of economy, I propose to summarize the circumstances giving rise to the relevant estoppel, rather than setting out the evidence in extenso. I believe I may safely do that in light of my earlier expressed attitude to the evidence, which I generally accepted, suggesting the more significant issue was where it led.

[65] I should first articulate the scope of the convention upon which CGU and QML proceeded. It applied to each of the policies for the years ended 1996, 1997 and 1998. The assumption was that the policy did not provide cover for QML partners for negligence in their own right, although it would cover a partner's vicarious liability for the negligence of a non-medical employee (see Mr Hansen (CGU) day 3, pp 73, 79; Ms Nicolson (QML's broker) day 3, pp 30, 32, 35, 39 and 52; Ms Nicholson Ex 30, para 103; Mr Hansen Ex 31, para 51). It was not an overlapping or duplicate insurance to that which the partners already had from AMIL. It provided cover for the employees of the partnership, or of the insured companies, in the event those employees were sued. And it provided cover where a claim against the partnership arose solely from the conduct of a non-medical employee, but excluded a situation where a partner failed properly to supervise the employee. Ms

Nicolson (day 3, p 75) and Mr Hansen (day 3, p 79) were in agreement that the CGU policy would not cover the D'Arcy claim.

[66] I refer now to the following pieces of evidence which principally support the existence of that position.

1. First there is Mr Hansen's (from CGU) account of his meeting in August/September 2006 with Ms Nicolson (of QML, then Ms Lacheca) and others. In para 45 of his statement (Ex 31) he said this:

> "To the best of my recollection, further to my memorandum to Mr O'Connor of 9 July 1996 I convened a meeting with Mr David Russell of QML, Karen Lacheca and Terry Kirkwood of Marsh & McLennan, and at least one other gentleman, whom I believe was an accountant employed by QML. This was the only occasion I had any direct contact with any representative of QML and, as best I can recall this meeting was held in August or September 1996 during which, to the best of my recollection,:
>
> (a) Dr Russell told me that the tests conducted at the QML pathology laboratory were not 100% accurate, but rather were considered 'screenings'. This is because not every blood cell is tested, only a small sample.
>
> (b) We discussed the extent of cover under the policy with Pacific Indemnity. The intention of the policy was discussed and Mr Russell agreed with me that the policy was intended to protect only employees. Also discussed was the extent of cover to the entity that employed the staff. I stated, and Mr Russell agreed, that if the partnership was sued due to an error by an employee other than a medical practitioner, the policy would respond. In this way, it was agreed the policy was a 'back-up' if the corporate entities (the partnership) were named in an action, provided that the claim against the partnership arose solely from the activities of an employee rather than those of a medical practitioner. It was a 'sleep easy' policy which was highly unlikely to be called upon as it would be rare for an employee to be sued directly.

(c) Given Dr Russell's agreement as to the coverage provided by the policy, I did not seek any agreement to change the policy at the meeting."

Mr Hansen was challenged about that account to the extent that the word "solely" did not appear in his memorandum of the meeting which is Annexure 34 to his statement. But I accepted Mr Hansen as a truthful and reliable witness, and I did not consider anything of significance attended his use of the word "solely" in his statement.

Dr Russell did not deny that this meeting occurred (day 1, p 64, ll 3-60).

2. Second, to allay concern being felt by cytologists about possible personal liability not covered by insurance, Dr Russell (of QML) drafted a notice intended to reassure them that they would not be personally at risk if sued for a mistake. He sought and received the approval of Mr Hansen (CGU) through QML's broker March and McLennan before publishing that notice to the cytologists.

Dr Russell's notification read:

"PROFESSIONAL INDEMNITY INSURANCE
This information has been prepared for use by Cytology Screeners in QML and for no other purpose. The information contained is not to be communicated with any persons not employed by Queensland Medical Laboratory or Oxley Medical Laboratory.

Recent litigation and threatened litigation against pathology firms in Australia has heightened the awareness of all pathology professional including staff directly responsible for screening, including Cytology Screeners.

It is obviously more important than ever to ensure that all staff use professional care in all the things that they do.

> For the information of those who may be more concerned about their level of duty of care than in the past, please bear in mind that before any QML employee will be personally liable for any mistakes which they or the laboratory may make, the following systems have to be satisfied:
>
> 1. The employee must first be actually negligent.
>
> 2. This negligence must be capable of proof in a court of law; proving professional negligence in a court of law can be very time consuming and difficult.
>
> 3. Even if negligence is proven in a court, that negligence has to be attached to an identified individual. Under common law employer/employee arrangements, the employer is liable for the actions of the employee. While there is nothing QML can do to prevent an aggrieved patient from taking action directly against QML's employees, in practice most plaintiffs will seek only to recover from the employer.
>
> 4. Even if the above are all satisfied and QML is unable for whatever reason to indemnify the employee, then all QML pathologists are members of a Medical Defence Organisation.
>
> 5. If all of the above mechanisms fail, QML has arranged a Professional Indemnity Insurance Policy with an independent underwriting insurance company, to cover its employees in the unlikely event that any liability could be attached to them.
>
> While no absolute guarantees can be given to anybody that there could never under any circumstances be negligence which attaches back to the individual, the above 'net' should ensure that no QML employee would ever be liable personally for any acts they commit whilst employed at QML."

Mr Hansen confirmed that para 5 of that notification accorded with his own view (Ex 31, paras 17 and 18). By that notification, Dr Russell, for QML, confirmed the intention that QML's policy with CGU would only respond, in favour of employees, where the AMIL policy did not, an intention inconsistent of course with any double insurance situation. Dr Russell

confirmed his view as to the accuracy of para 5 of the notification in his oral evidence (day 1, p 35, l 23). Additionally he was asked (day 1, p 35, ll33-34):

> "Let's just concentrate on what you did write, please, Mr Russell, if you don't mind. We will concentrate on what is in the document. What you said in number 5 is 'If all of the above mechanisms fail', and what you meant by that is if Medical Defence Society for some reason didn't cover a claim, then the employees had the knowledge or the comfort that in the unlikely event that they were sued or caught up in something, there was professional indemnity insurance separately that had been arranged for them. That is what you meant. Is that correct?"

He agreed.

3. Third, before Dr Russell (of QML) sought the insurance from CGU for the relevant, 1997-8 policy year, by the QML proposal of 6 May 1997 (Ex 4), Dr Russell sought advice from CGU, in January 1997. On 4 February 1997 Mr Hansen (of CGU) faxed QML's broker Marsh and McLennan noting that non-employee practitioners were not within the scope of the 1997 policy (Ex 31, Annexure 28). Ms Nicolson wrote to QML the following day in the same terms (Ex 18). Dr Russell did not demur, and went on to submit the proposal for the 1998 policy. He did not take advantage of an invitation to seek excess cover to meet his concerns. The advice was consistent with the understanding of the risk covered by the CGU policy which was shared by Ms Nicolson and Mr Hansen, and Dr Russell is to be taken to have agreed in it.

4. Fourth, there was the circumstance that Dr Russell was anxious to avoid unnecessary double insurance in that it would involve the payment of additional premium for risks already covered. As he said in Annexure 34 to Mr Hansen's statement (Ex 31):

> "No cover for partners was understood to be included, as this is what they [the partners] pay the MDS [Medical Defence Society] so much money for."

There are many other pieces of evidence supporting the existence of that mutually held assumption. Going the other way, the plaintiffs contend, is the defendant's treatment of claims brought by Ms Fraser, Ms Ludicke and Mr Friend.

The Fraser claim

[67] In late 1995, Ms Fraser brought proceedings in New South Wales against the partners of QML. AMIL sought contribution from CGU. Mr Moore acted as solicitor for CGU (I accepted his evidence). The claim was eventually settled, with a contribution from CGU equal to that paid by AMIL. (The parties were then differently named.) The plaintiffs now contend that although Mr Moore considered the CGU policy was only ever intended to extend to cover an employee sued as such, no other player agreed with him.

[68] This claim relates to the 1996 CGU policy. When AMIL sought contribution from CGU, both CGU and QML were highly disturbed. The policy then contained a medical practitioner exclusion endorsement (cl 8). In drafting item 11 for the 1998 policy, Mr Hansen, aware of that Fraser claim, sought to shore up the convention, agreed in by Dr Russell and him, which they considered had been breached by AMIL in the Fraser case (Ex 3, Ex 31 paras 52-53). The claim had put Mr Hansen on a state of "high alert" (day 3, p 75, ll 22-32).

[69] Far from suggesting acquiescence on the part of CGU in the claim for contribution brought against it, CGU's reaction to the claim was one of alarm, on the basis the making of the claim subverted an established understanding. While there was a settlement to which CGU contributed, that occurred in Sydney without involvement on the part of Mr Moore.

[70] Dr Russell of QML was likewise surprised by the making of the claim. He observed in a letter to Marsh and McLennan enclosing Ms Fraser's statement of claim:

> "It may appear now that Medical Defence may seek to have professional indemnity underwriters join them in any defence. This is a precedent and quite surprising to us considering Medical Defence's history."

[71] The claim upon CGU had been made ostensibly on behalf of QML by solicitors Flower and Hart. Their letter of 3 November 1995 read:

> "Re: Queensland Medical Laboratory – Rhonda Fraser
> Policy Number 04MIS0100567 – Account Number: 0100004
>
> We act on behalf of the Queensland Medical Laboratory in respect of an action brought against the partners by Ms Rhonda Fraser in the District Court of New South Wales at Sydney.
>
> …
>
> On behalf of our clients we apply for indemnity in respect of this claim under the above Policy. Would you please refer this request to the underwriter.
>
> Would you please also request a response to this application for indemnity as a matter of urgency as there are matters which must be addressed in the immediate future."

[72] On the evidence before me, Flower and Hart had obtained no direct authority from QML to write and send that letter claiming indemnity. It therefore seems, as submitted for the defendant, that "the claim against CGU was driven, not by QML

(with which it had the common assumption) but by the medical defence insurer with which it had no communications and which had been cold and extremely secretive in its dealings with QML itself". That attitude was established by the evidence before me. See Ex 22, paras 21 and 30.

[73] In all these circumstances, I do not consider that CGU's contribution to the Fraser settlement significantly detracts from the strength of the mutual assumption or understanding otherwise established by the evidence.

The Ludicke and Friend claims

[74] These were claims for compensation for injuries suffered by patients who fainted following the extraction of blood. The claims were based on the alleged negligence of non-medical employees of the business, in circumstances where QML was sued on the basis of vicarious liability.

[75] Meeting those claims was therefore not inconsistent with the convention established by Ms Nicolson and Mr Hansen and at least inferentially accepted by Dr Russell.

Conclusion

[76] I conclude that the plaintiffs are estopped from claiming from the defendant an indemnity or contribution under the 1997/8 CGU policy in respect of the D'Arcy/Vinnicombe claim.

Basis for contribution

[77] It is unnecessary in these circumstances that I determine the proportion in which any contribution would have been determined. But I record the submissions of Counsel.

[78] Counsel for the defendant submitted that "the overriding principle guiding the basis of apportionment is that which will work justice and equity between the insurers upon the facts of a particular case", leading into the submission that:

> "Given that AMIL had 16 separate policies covering the risk (cumulatively covering $76 million (sic), a figure obtained by adding up the separate limits of the schedules contained in exhibit 6) and CGU had one policy (covering $2 million – exhibit 3) it is CGU's contention that it would be inequitable for CGU to have to contribute 50% to the settlement, the principle of contribution being an equitable one. AMIL received 16 separate premiums (the amount of which was never revealed in evidence). CGU received one premium which, on unchallenged evidence, was inadequate to cover the risk of negligence by partners of QML.
>
> Accordingly, the only fair and equitable basis is for CGU's contribution to be limited to 1/17th of the amounts contributed is ordered in respect of. To do otherwise would allow AMIL to benefit unjustly from a circumstance of chance arising from the fact that all of the doctors had arranged their insurances with AMIL and not some other insurer(s)."

[79] In response, Counsel for the plaintiffs submitted that:

> "The contention overlooks the proper basis with respect to contribution for double insurance. The contribution does not arise because there are multiple insureds – it arises because there are multiple insurers of the risk which eventuated, ie there are two parties who share the obligation to discharge the same liability.
>
> The double insurance arises here because there are two insurers of the risk which eventuated. One of them has paid the money that the other one was also liable to pay. The fact that 15 separate policies issued one for each of the 15 partners has no impact on the proper apportionment. The Defendant issued one policy for the 15 partners. The effect is the same. Each of the First Plaintiff and the Defendant were obliged under their respective insurance policies to pay the amount of the Claimant's claim and other costs in full to the benefit of all the partners. That is, there were two parties with the obligation to pay the same sum."

[80] While as I have said it is not necessary that I express a view on this matter, my preliminary inclination would be to prefer the position adopted by Counsel for the plaintiffs.

Orders

[81] The orders I accordingly make are as follows:

1. that the proceeding be dismissed;
2. that the plaintiffs pay the defendant's costs of and incidental to the proceeding, including any reserved costs, to be assessed on the standard basis; and
3. that there be liberty to apply in relation to the question of costs, should it be submitted some alternative order is appropriate.